C.R.No.80/04

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH, JAIPUR

S.B. CIVIL REVISION PETITION NO.80/2004
Ram Singh Vs. Pukh Raj & Ors.

DATE OF ORDER :: 20/11/2006

HON'BLE MR. JUSTICE AJAY RASTOGI

Mr. B.L. Mandhana, for petitioner
Mr. S.R. Yadav, for respondents

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Instant revision petition has been filed by the defendant-petitioner against the order dated 17th April, 2004 whereby his application filed under O.7 R.11 and O.23 R.1(4) CPC was rejected by the learned trial Judge with an observation that such dispute can be resolved only after the parties are permitted to lead evidence and not at the initial stage.

It has been informed to this court that after written statement was filed by the defendant-petitioner, issues have been framed and the matter is presently pending for evidence of the plaintiff.

Brief facts for adjudication of the dispute are that earlier the non-petitioner-plaintiff filed a suit for permanent injunction on 8th December, 1992, but the same was dismissed as withdrawn on 11th December, 1992. A fresh suit was filed on 16th January, 1993 and after notice was served on the defendant-petitioner, written statement was filed and application was also moved under O.7 R.11 CPC

with an objection that the pleadings and the prayer of the earlier later suit are one and the same. As such, the second suit filed for the same cause of action in view of O.23 R.1(4) CPC is not maintainable and deserves rejection. The non-petitioner-plaintiff submitted reply and pointed out that earlier suit was withdrawn on 11th December, 1992 and the later suit was filed on 16th January, 1993 and in fact he has further prayed for demolition of the construction made on the disputed suit property. Counsel further submits that since the earlier suit was not decided on merits it may not come as a bar for adjudication of the dispute which he has raised in the suit filed on 16th January, 1993.

Learned trial Judge after taking into consideration the submissions and on the judgment placed reliance by either of the parties, finally arrived to a conclusion that no opinion at this stage could have been expressed in the matter and it can be decided only after parties are permitted to lead evidence at later stage. In this regard issue No.4 has been specifically made based on the objection raised by the defendant-petitioner in his written statement.

Counsel for petitioner vehemently contends that the learned trial Judge committed serious error in not appreciating the basic provisions highlighted by him with regard to maintainability of second suit, particularly, the pleadings and so also the prayer of the earlier suit and of the present one filed on

16th January, 1993 were almost the same except there is some minor changes which will not affect the relief which the petitioner has prayed for in the suit in question. Nowhere plea of res judicata which the learned trial Judge has considered was raised while deciding the application filed by the petitioner under O.7 R.11 CPC under the order impugned dated 17th April, 2004.

Counsel for respondents, on the other hand, supported the finding recorded by the learned trial Judge and submits that the specific prayer to this effect has been made for demolition of the said illegal construction and further prayer has also been made which he has never prayed for in the earlier suit filed on 8th December, 1992 and since the issue No.4 has been specifically made on the objection raised by the petitioner in his written statement, learned Judge has not committed any error in recording observation that the same can be decided only after parties are permitted to lead evidence.

I have considered the submission of the counsel and also perused the finding recorded under the order impugned.

So far as the scope of O.23 R.1(4) CPC is concerned, that if the earlier suit has been compromised, at a later stage the same dispute cannot be raised by filing a fresh suit for the same cause of action, but in the instant case, the suit was dismissed as withdrawn and it has not been

observed under the order by the learned trial Judge that the plaintiff withdrew the suit, on arriving compromise between the parties. Apart from it, counsel for respondents has read over before me the prayer in the earlier suit and so also of the present suit which has been filed on 16th January, 1993. Prima facie, I find that the prayer for demolition of encroachment, which he has made in the suit, which was filed on 16th January, 1993, was not earlier available. Apart from it, when on the objection raised by the petitioner in his written statement, issue No.4 has been specifically made in this regard and matter is pending before the learned trial court for recording the evidence which is to be led by the petitioner and in such circumstances, I do not find any error in the order to interfere, particularly, when the issue has been framed and which can be adjudicated only after parties are permitted to lead evidence.

I do not find any error which caused any jurisdictional error or material irregularity while recording finding under the order impugned dated 17th April, 2004.

Consequently, the revision petition fails and is hereby dismissed. Both the parties are directed to appear before the learned trial court on 11th December, 2006. Office is directed to send the record of the case immediately to the trial court.

[AJAY RASTOGI],J.

FRBOHRA,JR.P.A.